Supreme Court, U.S.

No. 931276 FEB 4 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

BRUCE ROY LEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 844(h), which provides that "[w]hoever * * * uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years," applies to a conspiracy to burn a cross in order to threaten or intimidate individuals in their exercise of rights secured by federal law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Discussion	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Bifulco v. *United States*, 447 U.S. 381 (1980)	5
Smith v. *United States*, 113 S. Ct. 2050 (1993)	6, 7, 8
United States v. *Hayward*, 6 F.3d 1241 (7th Cir. 1993), petition for cert. pending, No. 93-1063	6, 7

Constitution, statutes and rule:

U.S. Const. Amend. I	5
18 U.S.C. 241	4, 8
18 U.S.C. 844(h)	2, 5, 8
18 U.S.C. 844(h)(1)	4, 6
18 U.S.C. 924(c)(1)	7
42 U.S.C. 3631(a)	4
Sup. Ct. R. 13.4	5

Miscellaneous:

Black's Law Dictionary (6th ed. 1990)	7
Webster's New International Dictionary of the English Language (2d ed. 1949)	7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

UNITED STATES OF AMERICA, PETITIONER

v.

BRUCE ROY LEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The panel opinion of the court of appeals is reported at 935 F.2d 952, and is set forth in the appendix to the petition in No. 93-7412 (Lee Pet. App.) at A19-A27. The order of the court of appeals vacating the panel opinion in part and granting rehearing en banc (Lee Pet. App. A18) is unreported. The en banc opinion of the court of appeals (Lee Pet. App. A2-A17) is reported at 6 F.3d 1297.

JURISDICTION

The judgment of the panel was entered on June 10, 1991. The judgment of the court of appeals upon rehear-

ing en banc was entered on October 7, 1993.[1] On December 30, 1993, Justice Blackmun extended the time for filing a petition for certiorari to and including February 4, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 844(h) provides that "[w]hoever * * * uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years."

STATEMENT

1. Respondent Bruce Roy Lee constructed and burned a cross in a field adjacent to the Tamarack Apartments in Coon Rapids, Minnesota. Lee Pet. App. A20-A21. Lee's girlfriend Debbie Dockter resided at the apartment complex. Approximately 15 black families lived in the complex. *Id.* at A21. One of these was Pearl Jones and her family, who lived in an apartment above Dockter. *Ibid.* Jones's son was rumored to have assaulted a white child. *Ibid.* Werner Jahr, who had read an article about the Ku Klux Klan, suggested the cross-burning, and Lee agreed that it was a good idea. *Ibid.*

Lee constructed the cross. Later that day, he told Dockter's sister that he intended to burn the cross to "do something about" problems with a black family upstairs. Lee Pet. App. A21; Tr. 144, 162. Jahr suggested to a neighbor that it was time to "take a stand against all the beatings that the white kids are taking from the blacks here" (Tr. 279), and that "the whites should start

---

[1] Although the court of appeals did not grant rehearing en banc as to the issue presented in this petition, we believe that the petition is timely filed. See note 2, *infra*.

standing up against the blacks there to try to get rid of them." Tr. 280. That night, Lee soaked the cross in mineral spirits and set it on fire on a hill across from the apartment building in which Dockter and the Joneses lived. Lee Pet. App. A21. The cross burned only briefly, but Dockter and Cathy Jahr (Werner Jahr's wife) called the police and fire departments because they were afraid the cross was going to set the field afire. Tr. 105-106, 154. Lee expressed his disappointment that the cross had not burned longer. Lee Pet. App. A21.

The burning cross was visible from the apartment building (Tr. 169), where it was seen by Pearl Jones and her family and friends, including several children. Lee Pet. App. A21; Tr. 189-191, 225-226, 231-234. Jones said to others observing the cross from her apartment balcony that she "hope[d] they don't come up here and burn us up." Lee Pet. App. A21; Tr. 191. She testified at trial that she was afraid and that seeing the cross made her think of the Ku Klux Klan, "people[] that hate blacks." Lee Pet. App. A21. Jones's twelve-year old daughter Angie was very frightened by the cross-burning. Tr. 191, 196, 225-228. She was afraid that "somebody would come up in the hall and take us away" (Tr. 227-228), and asked her mother if someone would "come upstairs and set us on fire while we were sleeping." Tr. 196. The other children in the apartment also were frightened and asked if someone was going to come and hurt them. Tr. 234-235. Pearl Jones believed that the cross-burning was directed at her. Tr. 197; see Tr. 252-253.

Lee subsequently told a neighbor that he had participated in the cross-burning, and that the burning cross "represented the klan, the symbol of the klan." Lee Pet. App. A21; Tr. 288. Lee said that he had burned the cross "to take a stand" and said that "[m]aybe that would get rid of some of the bad blacks that were there, they would

take the message seriously and leave." Lee Pet. App. A21; Tr. 288. Werner Jahr testified at trial that he recognized burning a cross as "a racial act" symbolizing "[v]iolence towards blacks." Tr. 94. He said that the cross was burned not only "[t]o make a statement" but also to frighten and threaten the blacks living in the complex (Tr. 110, 131), and that he wanted the blacks to move out. Tr. 134-135.

2. Lee was charged with felony conspiracy to threaten or intimidate individuals in their exercise of federally guaranteed rights in violation of 18 U.S.C. 241 (Count I), interference with housing rights through force or threat of force in violation of 42 U.S.C. 3631(a) (Count II), and use of fire in the commission of a federal felony in violation of 18 U.S.C. 844(h)(1) (Count III). Lee Pet. App. A20. After a jury trial, Lee was convicted on Counts I and III and acquitted on Count II. *Ibid.* On May 18, 1990, Lee was sentenced to imprisonment for a term of 21 months on Count I. As required by 18 U.S.C. 844(h)(1), he was also sentenced to 60 months' imprisonment on Count III, with three years of supervised release following imprisonment. Lee Pet. App. A20 n.2.

3. On appeal, a panel of the court of appeals affirmed Lee's conviction on Count I (Lee Pet. App. A21-A25), but reversed on Count III, holding that Lee "did not use fire to commit a felony within the meaning of 18 U.S.C. § 844(h)(1)." Lee Pet. App. A25. Until 1982, Section 844(h)(1) prohibited only the use of an explosive in the commission of a federal felony. With the enactment of the Anti-Arson Act of 1982, the statute was amended to cover the use of fire as well. After examining the legislative history, the panel found that the purpose of the 1982 amendment was "to facilitate the prosecution of arson" (Lee Pet. App. A25, footnotes and citations omitted):

> The amendment was intended to remove the obstacle of proving the prior requirement that the damage caused by arson was caused by means of an "explosive." There is no indication that the amended statute was intended to apply to facts such as those before us. Lee did not commit arson, nor did he damage persons or property by the use of fire.

Applying the "rule of lenity," the panel concluded: "Because we are left to guess as to whether Congress intended § 844(h)(1) to apply to facts such as these, we must reverse." Lee Pet. App. A25 (citing *Bifulco* v. *United States*, 447 U.S. 381 (1980)).

4. Lee filed a petition for rehearing with suggestion for rehearing en banc, contending that the panel had erred in rejecting his First Amendment challenge to his conviction on Count I. The United States opposed the petition but asked the court of appeals to review the panel's reversal of the Count III conviction if it decided to rehear the case. Lee Pet. App. A4. The Eighth Circuit granted rehearing en banc "as to Count I only" and vacated the panel opinion and judgment "as it pertains to Count I." Lee Pet. App. A18.[2]

---

[2] The instant petition seeks review of the panel decision, issued on June 10, 1991, as to the applicability of 18 U.S.C. 844(h)—an issue on which the court of appeals did not grant rehearing en banc. We believe that the petition is timely filed. Rule 13.4 of the Rules of this Court states that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." The Rule does not establish a different deadline when a petitioner seeks review of aspects of a panel's holding that are not encompassed within the grant of re-

Upon rehearing en banc, the court of appeals reversed Lee's conviction on Count I and remanded for retrial. Lee Pet. App. A2. On January 4, 1994, Lee filed a petition for certiorari seeking review of that ruling. *Lee* v. *United States*, No. 93-7412. The United States expects to oppose Lee's petition.

DISCUSSION

Section 844(h)(1) of 18 U.S.C. provides that "[w]hoever * * * uses fire * * * to commit any felony which may be prosecuted in a court of the United States," shall be subject to a mandatory minimum sentence of five years imprisonment in addition to the sentence imposed for the underlying felony. The Eighth Circuit's ruling that 18 U.S.C. 844(h)(1) does not apply to cross-burning prosecutions squarely conflicts with the judgment of the Seventh Circuit in *United States* v. *Hayward*, 6 F.3d 1241, 1248 (1993). The ruling is also inconsistent with this Court's intervening decision in *Smith* v. *United States*, 113 S. Ct. 2050 (1993), regarding the meaning of the word "use" in a similar statute involving the use of firearms in the commission of a crime of violence or drug trafficking.

1. In *Hayward* the Seventh Circuit considered the claim, accepted by the Eighth Circuit panel in the instant case, that "section 844(h)(1) does not apply to [cross-burning cases] because Congress intended the statute only for the prosecution of arson cases." 6 F.3d at 1245. The court rejected that contention, concluding that "[t]he language of the statute does not limit itself to the prosecution of arson cases." *Id.* at 1246. Rather, the court held, the statutory language clearly and unam-

---

hearing. Nor would it be wise as a matter of judicial administration to split the case in such a fashion.

biguously encompasses cross-burning. *Id.* at 1246-1248. The court acknowledged that the Eighth Circuit panel in the instant case had reached a contrary result. It stated, however, that "because the *Lee* court bypassed the clear and unambiguous language of section 844(h)(1), we reject its determination that section 844(h)(1) does not apply to cross burnings done to violate another's civil rights under 18 U.S.C. § 241." *Id.* at 1248.

The defendants in *Hayward* have filed a petition for certiorari seeking review of the same question presented by this petition. *Hayward* v. *United States*, No. 93-1063. Because the circuits are squarely in conflict and the issue is one of continuing importance for the enforcement of federal civil rights laws, we believe that the Court should grant certiorari in *Hayward* to resolve this question. The instant petition should be held pending this Court's disposition of *Hayward*.

2. Should the Court deny the petition for certiorari in *Hayward*, we suggest that it grant the instant petition, vacate the judgment of the panel with respect to Count III of the indictment, and remand for further consideration in light of *Smith*. In *Smith*, the Court examined 18 U.S.C. 924(c)(1), which provides a mandatory minimum sentence when a defendant "during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm[.]" As the Court found in *Smith*, the "every day meaning" of the term "use" includes "to convert to one's service," "to employ," "to make use of," "to avail oneself of," "to utilize," "to carry out a purpose or action by means of." 113 S. Ct. at 2054, quoting *Webster's New International Dictionary of the English Language* 2806 (2d ed. 1949); *Black's Law Dictionary* 1541 (6th ed. 1990). Here, Lee clearly "use[d]" fire in the commission of a federal felony in the sense

that he "utilize[d]" or "employ[ed]" fire to burn the cross in violation of 18 U.S.C. 241. His "purpose or action" was to threaten the Jones family in the exercise of their federally guaranteed housing rights in violation of 18 U.S.C. 241. He plainly "carr[ied] out" that purpose "by means of" fire.

The decision in *Smith* postdates the panel decision in the instant case. This Court may therefore wish to resolve the circuit conflict by directing the Eighth Circuit to reconsider its prior interpretation of Section 844(h) in light of *Smith*.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *Hayward* v. *United States*, No. 93-1063. If the Court does not grant certiorari in *Hayward*, we suggest it grant the instant petition, vacate the judgment of the court of appeals panel as to Count III of the indictment, and remand for further consideration in light of *Smith* v. *United States*, 113 S. Ct. 2050 (1993).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

FEBRUARY 1994